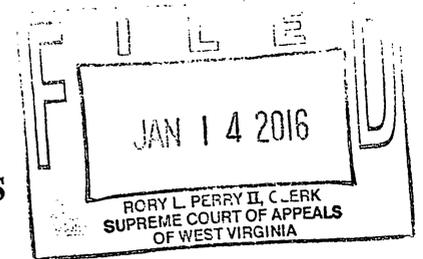


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 14-0670

THORN H. THORN,

Respondent.

REPLY BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL

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THE FINDINGS OF THE HEARING PANEL SUBCOMMITTEE

The Hearing Panel Subcommittee (hereinafter “HPS”) found that the evidence established that Respondent committed multiple violations of the West Virginia Rules of Professional Conduct in a number of different matters,¹ and concluded that Respondent violated duties to his clients, the public, the legal system, and the legal profession. Further, Respondent’s actions were determined to have been more negligent than intentional, resulting in a great amount of real and potential injury. The recognized aggravating factor by the HPS was a pattern and practice of misconduct on multiple occasions by failing to communicate with his clients; failing to diligently pursue claims on behalf of clients; and failing to respond to requests for information from ODC. Mitigating factors set forth by the HPS were the absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to disciplinary board and cooperative attitude toward proceedings, mental disability, and obvious and repeated expressions of contrition and remorse during the hearing. In his brief, Respondent does not dispute any findings of the HPS, including the recommended sanctions, which included a suspension period of ninety days, in addition to other sanctions regarding restitution, supervised practice, and counseling. Indeed, the record fully supports the adoption of the findings of fact made by the HPS and the corresponding rule violations by this Honorable Court.

¹ The HPS found that the evidence established that Respondent had committed one (1) violation of Rule 1.1; eight (8) violations of Rule 1.3; seven (7) violations of Rule 1.4 (a) and (b); eight (8) violations of Rule 3.2; two (2) violations of Rule 1.15(b); five (5) violations of Rule 1.16(d); five (5) violations of Rule 8.1(b), and three (3) violations of Rule 8.4(c) of the Rules of Professional Conduct, as set forth in the Brief of the Office of Disciplinary Counsel.

The Office of Disciplinary Counsel (hereinafter “ODC”) disagrees, however, with certain recommendations made by the HPS, including that of a ninety-day suspension of Respondent’s law license, and has asked that this Court instead impose upon Respondent at least a one-year suspension, with the requirement of petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure. The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board’s recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 290, 452 S.E.2d 377, 381 (1994). It is also well settled that “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.’ Syllabus point 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984),” Syllabus Point 1, Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003).

The ODC has also asked that this Court consider additional violations of the Rules of Professional Conduct based upon the reliable, probative, and substantial evidence on the whole record in this matter, as well as the additional aggravating factors of substantial experience, based upon Respondent’s many years of practice, and multiple offenses, based upon the HPS’s finding that Respondent committed thirty-nine distinct violations of the Rules of Professional Conduct, which Respondent does not dispute.

The ODC believes that this Court should also reject the finding that Respondent's claims of suffering from situational depression establishes a mental illness that should be considered a "legitimate and substantial mitigating factor" in this matter. In its recommendation, the HPS found that Respondent met with a professional counselor and therapist on one occasion, on January 15, 2015, and that during this meeting Respondent disclosed that he had suffered from feelings of hopelessness, worthlessness, and lack of the ability to enjoy anything for a period following the dissolution of his marriage. Based upon the representations of Respondent during this single session, and a few previous observations of Respondent, it was the therapist's opinion that Respondent had experienced significant depression during the time periods discussed at the hearing. Respondent's meeting with a therapist occurred well after the conduct described in the Statement of Charges was alleged to have occurred, and also after the Statement of Charges was filed by the ODC on or about July 14, 2014. There was no evidence presented regarding any other medical treatment Respondent sought either before or after the periods of the complaints herein.

Based upon the testimony of only the therapist and Respondent, the HPS found there to be (1) evidence that Respondent was affected by a mental disability; (2) that the mental disability caused Respondent's misconduct; (3) that Respondent's recovery from the mental disability was demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct was unlikely. Citing Syllabus Point 3 of Lawyer Disciplinary Board v. Dues, 218 W.Va. 104,

624 S.E.2d 125 (2005), the HPS determined that Respondent's mental disability justified a reduction in the degree of discipline to be imposed upon Respondent.

While in appropriate circumstances a mental disability may be considered as a mitigating factor in determining an appropriate sanction, the HPS erred in their finding that there is clear and convincing evidence present in this case to establish Respondent's depression as a mitigating factor based upon the enumerated factors set forth in Dues, *supra*. Respondent should not be allowed to present the evidence of a single meeting with a therapist, that likely came about in anticipation of his disciplinary hearing, as the medical evidence necessary to prove that Respondent suffered from depression, that the depression caused his misconduct, and that meaningful and sustained period of successful rehabilitation has occurred on his part. *See*, Lawyer Disciplinary Board v. Michael S. Santa Barbara, 229 W.Va. 344, 729 S.E.2d 179 (2012) (Respondent lawyer failed to present adequate evidence reflecting he had attained meaningful recovery or that the rehabilitative measures he undertook were adequate to assure that recurrent misconduct was unlikely when record reflected that he made limited use of a doctor's services). As argued previously to this Court by the ODC, the record also does not contain evidence indicating that Respondent has taken any steps toward rehabilitation to ensure that similar misconduct is unlikely in the future. Because the evidence unequivocally fails to establish each of the factors set forth in Dues, this Court should not find Respondent's alleged depression to be a mitigating factor in this case.

SANCTION

The principle purpose of attorney disciplinary proceedings is “protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice[.]” Committee on Legal Ethics v. Keenan, 192 W.Va. 90, 94, 450 S.E. 2d 787, 791 (1994). Taking into account the severity and number of instances of Respondent’s misconduct, as well as the impact his actions have had on his clients and the public, the ODC asserts that the recommendation submitted by the HPS with regard to the length of suspension of Respondent’s law license is too lenient. There is an abundance of evidence in this case to justify a harsher sanction.

As argued in the Brief of the Office of Disciplinary Counsel, Respondent has transgressed all four factors set forth in Syllabus Point 4 of Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998).² Respondent has violated duties to his clients, the public, the legal system and legal profession. There is also evidence that demonstrates that Respondent’s actions in the underlying matters were more than just negligent. If Respondent’s actions were truly negligent and not intentional or knowing, the same misconduct would not have been repeated on numerous occasions. Instead, Respondent continued to charge clients money for work that he never performed, failed to communicate with them, failed to immediately refund their money despite their requests, and failed to

² Whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; whether the lawyer acted intentionally, knowingly, or negligently; the amount of the actual or potential injury caused by the lawyer’s misconduct; and the existence of any aggravating or mitigating factors.

respond to information requests from the ODC. Respondent's actions have caused both real and potential harm, and there are multiple aggravating factors present.

This Court came to a similar determination in Lawyer Disciplinary Board v. Dennie S. Morgan, Jr., 228 W.Va. 114, 717 S.E.2d 898 (2011), when it rejected the HPS's recommendation of a reprimand, finding it to be too lenient, and instead imposed a one-year suspension and other sanctions due to multiple violations of the Rules of Professional Conduct including those requiring reasonable diligence and promptness in representation, reasonable communication with clients, charging reasonable fees, and responding to the requests of the ODC. As in Morgan, the sanction proposed by the HPS in this case does not adequately address the serious misconduct committed by Respondent. Moreover, it is not clear at this point that recurrence of similar misconduct on the part of Respondent is unlikely, which is why the additional safeguard of requiring a reinstatement proceeding pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure is necessary.

A strong sanction is necessary to serve as an instruction on the standards for ethical conduct and effectively deter lawyers who may be considering or who are engaging in similar conduct. In addition, by ordering a strong sanction in this proceeding, the Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice.

CONCLUSION

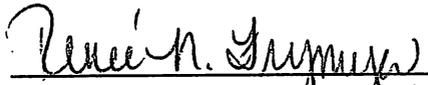
A review of the record establishes that the charges against Respondent have been proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer

Disciplinary Procedure. The Hearing Panel Subcommittee properly considered this matter and made proper findings of fact. However, the ninety-day suspension period proposed by the HPS is inadequate considering the clear and convincing evidence against Respondent and precedent of this Court. Wherefore, based upon the forgoing, the ODC respectfully requests that this Court, after giving respectful consideration to the HPS's recommendations, exercise its own independent judgement, and order the following:

1. That Respondent's law license be suspended for at least one year;
2. That prior to reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent shall issue refunds to Debra Miller in the amount of One Thousand One Hundred Dollars (\$1,100.00), Martin Donovan in the amount of Six Hundred Dollars (\$600.00); Mark Benkiel in the amount of Twenty Four Thousand Dollars (\$24,000.00); and issue itemized statements of account to Jessica Morris, Daniel Britton, Lisa Long, and Carly Wears, in addition to providing them with refunds where appropriate, and provide proof thereof to the ODC;
3. That prior to reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent file a report with the ODC of a licensed psychologist or psychiatrist verifying that Respondent's mental status is such that he is capable of performing his profession as a lawyer;
4. That, upon reinstatement, Respondent's practice shall be supervised for a period of one year by an attorney agreed upon between the ODC and Respondent; and

5. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Office of Disciplinary Counsel
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 14th day of January, 2016, served a true copy of the foregoing “**Reply Brief of the Office of Disciplinary Counsel**” upon Respondent Thorn H. Thorn, Esquire, by mailing the same via United States Mail with sufficient postage, to the following address:

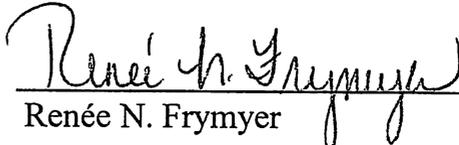
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